

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the Minnesota  
Joint Underwriting Association -  
FACT,  
Notice of Activation to Insure  
AND

FINDINGS OF

CONCLUSIONS

Specified Classes of Business and  
RECOMMENDATION  
and Public Hearing (JUA VI).

The above-entitled matter came on for hearing before  
Administrative Law  
Judge Peter C. Erickson on June 29 and 30, 1987, in Courtroom 12,  
Third Floor,  
Summit Bank Building, 310 Fourth Avenue South, Minneapolis,  
Minnesota. The  
record in this matter closed on July 6, 1987, after receipt of the  
last  
post-hearing memorandum.

Representatives from the following classes of business appeared  
and  
testified at the hearing:

(1) Bankers Blanket Bond - Dennis D. Anderson, Chief Executive  
Officer of  
the First State Bank of Good Thunder, P.O. Box 68, Good Thunder, Minnesota  
56037.

(2) Roller/Ice Skate Rentals - Scott Sansby, Owner-Operator of  
Rolling  
Soles, Inc., 1700 Lake Street West, Minneapolis, Minnesota 55408.

(3) Hydrogeologist - Linda Lehman, on behalf of L. Lehman &  
Associates,  
11003 West Burnsville Parkway, Suite 107, Burnsville, Minnesota 55337.

(4) Medical Equipment Sales and Rental - Roger Ruetten, on behalf  
of PR  
Medical Equipment, Ruetten, Inc., 275 South Third Street, Stillwater,  
Minnesota 55082.

Insurance agent Mark E. Rosenberg, Peilen & Peilen, 1150 Baker  
Building,  
706 South Second Avenue, Minneapolis, Minnesota 55402-3094, appeared  
on behalf  
of Rolling Soles, Inc. James F. Mewborn, from the firm of Hart,  
Bruner,  
O'Brien & Thornton, Attorneys at Law, 1221 Nicollet Mall, Suite 700,

Minneapolis, Minnesota 55403, appeared on behalf of L. Lehman & Associates.

John A. Knapp, from the firm of Winthrop & Weinstine, Attorneys at Law, 1800 Conwed Tower, 444 Cedar Street, St. Paul, Minnesota 55101, appeared on behalf of intervenor American Insurance Association, et al. (AIA). John C.

Bjork, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Minnesota Department of Commerce but did not participate during the hearing on this matter.

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after review of the record which may

adopt, reject or modify the Findings of Fact, Conclusions and Recommendations contained in this Report. Minn. Stat. 62I.22, subd. 3 (1986) provides that the hearing in this case and all matters after the hearing are a contested case under Minn. Stat. ch. 14. Chapter 14 provides that an opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Minn. Stat. 62I.22, subd. 4 (1986) provides that the Commissioner shall make a decision in this case within ten (10) days of receipt of the Administrative Law Judge's Report. Written exceptions and argument may be presented to the Commissioner of Commerce, Michael A. Hatch, Minnesota Department of Commerce, Fifth Floor, Metro Square Building, Seventh and Robert Streets, St. Paul, Minnesota 55101, within seven (7) days of the issuance of this Report.

#### STATEMENT OF ISSUES

The issues to be determined in this contested case proceeding are whether activation by the Commissioner of Commerce of the Market Assistance Plan (MAP) and the Joint Underwriting Association (JUA) for the class members appearing at the hearing is necessary beyond the 180-day original activation period. It must be determined whether the class members have shown that they were (1) unable to obtain insurance through ordinary means and (2) that the insurance sought is either (a) required by statute, ordinance or other law, or (b) is necessary to earn a livelihood or conduct a business and serves a public purpose. Additionally, the intervenor, American Insurance Association, raised the issue of the authority of JUA to issue bonds.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

##### Procedural Matters.

1. Notices of Activation to Insure Specified Classes of Business and Public Hearing were published in the State Register by the Commissioner of Commerce on April 13, May 11, and May 25, 1987 (11 S.R. 1888, 2082 and 2170, respectively). In conjunction with these publications, notices and letters informing applicants about the statutory hearing process were mailed to all persons who had applied for coverage under the Joint Underwriting Association in the specified classes of business.

2. A Prehearing Conference in this matter was held on June 19, 1987 at 10:00 a.m. at the Office of Administrative Hearings. On June 23, 1987, a Prehearing Order was issued to all known parties, setting a partial hearing schedule and advising parties of documents and information to be brought to the hearing.

This issue was raised in previous JUA proceedings and is currently on

appeal in the Minnesota Court of Appeals. This Office and the Commissioner of  
Commerce have previously ruled that the JUA does have authority to issue  
bonds. This Judge will follow the Commissioner's holding on that issue.  
Consequently, this issue will not be discussed further herein.

3. Several classes of business listed in the Notices of Public Hearing on Permanent Activation failed to have any member appear at the hearing in this matter and, therefore, cannot be considered in this proceeding. They are: financial consultant for municipalities, performance bond for roofing contractors, methane gas collection and pipeline operation, fireworks display companies, workers compensation consultant, foster care placement, salvage yards, and workers compensation self-insurers bond.

#### Bankers Blanket Bond

4. On February 12, 1987, the First State Bank of Good Thunder (hereinafter "Bank") was notified by the St. Paul Fire & Marine Insurance Company that its bankers blanket bond would be cancelled in 60 days. The bond was cancelled effective April 12, 1987, and the bank was and currently is unable to find replacement liability coverage.

5. On April 24, 1987, the Commissioner of Commerce issued a Temporary Order to Cease and Desist to the Bank, because it was in violation of Minn. Stat. 48.12 (1986), which requires that all commercial banks be bonded. The Bank was permitted to continue operations, however, contingent upon the successful application for coverage under the JUA.

6. Lloyds of London Insurance Company offered a liability bond to the Bank which had \$500,000 of coverage with a \$50,000 deductible. The premium for this policy was \$43,500 with an additional \$4,000 for the cost of an examination by the insurance company. The Bank declined this offer, however. The Bank had been paying a premium of \$3,600 for bond coverage of \$175,000 through the St. Paul Fire & Marine Insurance Company.

7. BancInsure, a captive insurance company formed by the Oklahoma Bankers Association and sponsored by the Minnesota Bankers Association, offered to insure the First State Bank of Good Thunder if it could obtain a capital forbearance letter from the Federal Deposit Insurance Corporation. The FDIC refused to grant such a forbearance, however. Presently, the Bank's capital as a percentage of assets is approximately 4.3 percent. The FDIC requirement is six percent. In order to bring the Bank's capital up to FDIC requirements, a capital infusion of approximately \$200,000 would be required.

8. The American Bankers Association operates a captive insurance company for the purpose of offering bonds to member banks. The First State Bank of Good Thunder had previously belonged to the ABA but does not currently.

9. As an alternative to bond coverage, the Bank could file a bond made up of five individual sureties or post a deposit of securities in a form and amount acceptable to the Commissioner. If either of these conditions were met, the Cease and Desist Order would be vacated.

10. At the present time, the Bank is unable to obtain \$200,000 to raise the capital-to-asset ratio to six percent. Additionally, the Bank has been unable to find individuals who would consent to be sureties for the Bank. The

worsening financial condition of the First State Bank of Good Thunder has resulted from a deterioration of asset quality over the last few years.

11. At the present time, insurance companies no longer offer bankers blanket bonds in Minnesota as a product for liability coverage. Rather, a

financial institution responsibility bond is currently offered and has been approved by the Department of Commerce for sale in the State. Its purpose and function, however, is the same as the bankers blanket bond; to provide liability coverage.

#### Roller/Ice Skate Rentals

12. Rolling Soles, Inc. is a company which sells and rents ice skates, roller skates, and roller blades. Approximately one-half of its revenues are generated by skate rental to individuals who use the skates on and around Lake of the Isles, Lake Calhoun and Lake Harriet.

13. Rolling Soles, Inc. is currently insured by Constitution State Insurance Company. This policy includes coverage for commercial property and commercial general liability. However, since May of 1986, Constitution State has refused to cover the liability associated with the rental portion of the applicant's business. The insurance company had provided rental liability coverage as part of its total insurance package prior to May of 1986, however.

14. After cancellation of the rental liability coverage by Constitution State in May of 1986, Rolling Soles, Inc., through its insurance agent, Mark Rosenberg, attempted to find replacement coverage in all available markets, including the surplus and excess markets. Because of the failure to find rental liability coverage, Rolling Soles requires that each of its rental customers sign a "hold harmless" waiver agreement. Because of this "waiver" requirement, some groups of rental customers have gone elsewhere to rent skates. However, Rolling Soles has not experienced a significant loss of revenues.

15. Rolling Soles, Inc. is in its tenth year of business and has had no claims filed against it.

#### Hydrogeologist

16. L. Lehman & Associates, Inc. (hereinafter "Lehman") is a small business specializing in ground water issues related to the characterization of nuclear and hazardous waste disposal sites. The firm was begun as a sole proprietorship by Linda Lehman in 1983 and was incorporated in July of 1985. The main focus of the firm's business is the assessment of sites for current and potential environmental impacts and ground water contamination. Specifically, the firm's services include preliminary site assessment, the planning of remedial investigations and monitoring networks, and data analysis, interpretation and report writing. Lehman's employees rarely, if ever, work in the field because of insurance constraints. The company employs ten individuals, two on a full-time and eight on a part-time basis.

17. Prior to May of 1986, Lehman was engaged mainly in third-party review work for the federal government. However, that contract was lost after Minnesota was deleted from the states considered as dumping sites for

hazardous waste. Subsequent to that time, Lehman has attempted to obtain professional liability coverage without success. Lehman has used several different insurance agents and companies to find coverage, both in the ordinary and excess markets, but no offers have been made.

18. At present, because of the lack of liability insurance, Lehman is confined to bidding on smaller projects that consist primarily of office work;



reviewing and critiquing other firms' work. Lehman cannot obtain any jobs that involve field work, despite the fact that field work is a part of the training and experience of its professional staff. Lehman cannot compete with other, more established firms that have been able to obtain liability coverage. Additionally, Lehman has a hard time attracting and keeping qualified personnel because of the erratic nature of its workload. Almost all of the contracts for long-term projects require that the bidder have liability insurance.

19. As the result of its inability to obtain liability coverage, Lehman has been unable to bid on many lucrative jobs which it otherwise was qualified to perform. The continuation and growth of Lehman's business is contingent upon its ability to bid on larger projects, all of which require liability insurance coverage.

#### Medical\_Equipment sales and Rental

20. PR Medical Equipment sells and rents durable medical equipment and supplies for in-home use for the purpose of promoting independent living for the users. The equipment is rented or sold either by prescription or for the convenience of the users. Business is obtained by referrals by physicians, public health care practitioners, home care agencies, private medical professionals, and the general public. The services are paid for either by a third party such as an insurance company or the State of Minnesota or the individual user.

21. In addition to the rental and sale of equipment, PR Medical Equipment offers a professional health care staff, equipment delivery, patient education, 24-hour emergency service, equipment service, patient need evaluation, insurance billing, and community education. Many specific types of equipment have special programs associated with their use. A medical equipment and supply business is a vital part of the home health care program that promotes quality, individualized and cost-effective health care.

22. PR Medical Equipment has been unable to obtain liability insurance coverage from September 30, 1986 to the present. A temporary policy was issued by the JUA which commenced on January 6, 1987 but was cancelled on June 13, 1987. Presently, the applicant does not have liability insurance. Prior to September of 1986, the applicant had liability insurance coverage with National Union Fire Insurance Company at a premium of \$2,100 per year. The policy was not renewed by National Union in 1986, however.

23. The applicant has attempted to obtain liability coverage in both the ordinary and excess markets through two insurance agencies. The applicant received one written quote for a liability policy with a premium of \$14,580. However, because the applicant's net profit last year was only \$18,000, the offer was rejected. Additionally, a verbal quote was received for a premium of \$17,000 but no written confirmation was received.

24. Referral sources constitute approximately 54 percent of the applicant's business. These referral sources have informed the applicant that they will no longer use it as an equipment supplier if it does not carry a liability policy.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS

1. The Commissioner of Commerce and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. 62I.21 and 62I.22 (1986).

2. The Department of Commerce has fulfilled all relevant substantive and procedural requirements of law and rule.

3. The Department of Commerce has given proper notice of the hearing in this matter.

4. The Commissioner of Commerce is authorized by Minn. Stat. 62I.21 (1986) to activate the Market Assistance Plan and the Joint Underwriting Association "to provide assistance with respect to the placement of general liability insurance coverage on Minnesota risks for a class of business

5. The JUA may be activated by the Commissioner only for the placement of general liability insurance as provided in Minn. Stat. 62I.21 (1986) and the coverage sought by each class of business appearing in this proceeding is within the line of general liability insurance. This includes bonding for liability coverage.

6. The burden of proof in this proceeding is upon each class of business seeking to continue the activation of the Market Assistance Plan and the Joint Underwriting Association on its behalf beyond the initial 180-day period.

7. The Joint Underwriting Association is authorized to provide insurance coverage to any person or entity unable to obtain insurance through ordinary means if the insurance is required by statute, ordinance or otherwise required by law, or is necessary to earn a livelihood or conduct a business and serves a public purpose. Prudent business practice or mere desire to have insurance coverage is not a sufficient standard for the Association to offer insurance coverage to a person or entity. Minn. Stat. 62I.02, subd. 1 (1986).

8. The following classes of business made no appearance at the hearing in this matter and, therefore, are in default in this case and have not sustained their burden of proof to show that it is necessary to continue the activation of the Market Assistance Plan and the Joint Underwriting Association for them beyond the 180-day period: financial consultant for municipalities, performance bond for roofing contractors, methane gas collection and pipeline operation, fireworks display companies, workers compensation consultant, foster care placement, salvage yards, and workers compensation self-insurers bond.

9. Each class of business appearing at the hearing proved that its

obtaining general liability insurance or professional liability insurance would serve a public purpose in the sense of protecting members of the public.

10. The following classes of business have sustained their burden of proof and made the showing required in Conclusion No. 7: bankers blanket bond, hydrogeologist, and medical equipment sales and rental.

11. The following class of business has failed to demonstrate by a preponderance of the evidence the elements set out in Conclusion No. 7: roller/ice skate rentals.

12. The questions of (1) whether the activities of certain persons or entities present a risk so great that they should not be offered insurance coverage, (2) whether coverage requested is for environmental impairment liability or product liability insurance, or (3) whether the activities to be covered are conducted substantially outside the State of Minnesota, as described in Minn. Stat. 621.02, subd. 1 (1986), are questions within the jurisdiction of the Minnesota Joint Underwriting Association rather than the Commissioner of Commerce in this contested case proceeding and have not been considered herein. See, Court of Appeals decision on JUA I, issued June 13, 1987.

13. The Conclusions above are arrived at for the reasons set out in the Memorandum which follows and which is incorporated into these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

It is respectfully recommended that the Commissioner of Commerce continue the activation of the Market Assistance Plan and the Joint Underwriting Association for the following classes of business: bankers blanket bond, hydrogeologist, and medical equipment sales and rental.

Dated this            day of July, 1987.

PETER C. ERICKSON  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped. Tape Numbers 5318 and 5398.

#### MEMORANDUM

The ultimate issue in this case is whether or not the classes of business who appeared at the hearing in this matter have established the "necessity" to activate the Minnesota Joint Underwriting Association (JUA) past 180 days. The standards by which that necessity is to be established are set out at

Minn. Stat. 621.02, subd. 1 (1986). A person or entity must show that it is

(1) unable to obtain insurance through ordinary methods, and (2) that the insurance is (a) either required by statute, ordinance or other law or is

(b) necessary to earn a livelihood or conduct a business and serves a public purpose. A guide to interpreting the standards is the language in the statute which states that "prudent business practice or mere desire to have insurance coverage is not a sufficient standard . . . ". In his Order of September 26, 1986 in the first JUA case (JUA-I), the Commissioner of Commerce determined that the proper interpretation of "necessary" is that it means "essential" rather than useful or convenient. In JUA II (December 8, 1986), the Commissioner approved a "significant impact" test to show necessity. The Judge will use a standard of "significant impact" herein to determine necessity.

#### Bankers Blanket Bond

Minn. Stat. 48.12 (1986) requires that "every state bank shall be protected against loss by reason of the unlawful act of any of its officers or employees by a surety bond . . . ". In lieu of the bonding requirement, Minn. Stat. 48.13 (1986) permits the use of "at least five individual sureties" or the deposit of securities of a form and in an amount acceptable to the Commissioner. The CEO of the First State Bank of Good Thunder testified that because of its low capital-to-asset ratio, it is unable to obtain a liability bond. Additionally, it is unable to locate individual sureties or securities in an amount to satisfy the alternative statutory requirements. If the Bank does not obtain a bond through this process, it will be forced to close.

The AIA's witness, John Hammond, Assistant Vice-President of U.S. Fidelity & Guaranty Company, testified that no insurance company in Minnesota currently offers a bankers blanket bond. Rather, that bond has been replaced with a new product called the Financial Institution Responsibility Bond. Consequently, the AIA argues that because the JUA was initially activated to provide coverage in the form of a bankers blanket bond, it cannot now change the purpose of its activation to provide a financial institution responsibility bond. AIA argues that notice was thus improper and the application of the First State Bank of Good Thunder should be denied until new notice is published.

The Judge has considered the issues raised by the AIA and determined that it is without merit. Even if the "bankers blanket bond" is no longer the product used by insurance companies in Minnesota, the intended coverage sought by the applicant Bank herein is clear on its face. The issue raised by AIA is one only of semantics, rather than substance. The Judge has concluded that the applicant Bank has met the statutory criteria for coverage by the JUA.

## Rollar/Ice Skate Rentals

In order to meet the burden of business necessity, it is imperative that an applicant show that the failure to have liability insurance has had or will have a "significant impact" on the business. It is not enough for an applicant to show that liability coverage is required because it is a "prudent business practice" or merely that the applicant desires to have the coverage for his or her own peace of mind. Mr. Sansby, on behalf of Rolling Soles, Inc., testified that the lack of coverage has not had a substantial impact on his business, rather, that he feels much more vulnerable to a lawsuit. The Legislature has mandated, however, that "vulnerability" or "prudent business practice" does not meet the statutory standard of business necessity. Consequently, the Judge has concluded that Rolling Soles, Inc. has not met the burden to show that activation of the JUA past 180 days is appropriate.



#### Hydrogeologist

The applicant, L. Lehman & Associates, Inc., has shown that it is unable to obtain insurance through ordinary methods, and that the insurance is necessary for the operation of the applicant's business because of the significant impact not having insurance has had on the company. Lehman has shown that it is unable to solicit or bid on many potential jobs because the "contractor" requires liability insurance coverage. Consequently, the future of Lehman is uncertain because it cannot solicit work for which it is qualified. The Judge has thus concluded that activation of the JUA beyond 180 days is appropriate for this applicant.

#### Medical Equipment Sales and Rental

The Judge has concluded that PR Medical Equipment has met the statutory burdens because it has shown that it is unable to obtain liability coverage and that the failure to have that coverage will have a significant impact on its business. The applicant has shown that over 50 percent of the business which it does comes from referral sources which require that the supplier have liability coverage.

P.C.E.